Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

BRYAN D. COLLINS, *et al.*
and JOHN W. STEWART, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a defendant's statutory right to removal foreclosed solely because a defense available to both diverse and nondiverse defendants serves as the basis for a finding that the nondiverse party has been fraudulently joined?

2. Where the "common defense" is a procedural defense and not a defense to the merits of the plaintiff's claim, does that common defense preclude a fraudulent joinder analysis and a diverse defendant's right to removal?

PARTIES TO PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit—the court whose judgment is sought to be reviewed—are:

Petitioners in this Court and Defendants/ Appellees in the underlying *Collins* matter: Wyeth f/k/a American Home Products Corporation d/b/a Wyeth Laboratories, Inc.; Wyeth Lederle; Wyeth Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; Aventis Pasteur, Inc., individually and as Successor in Interest to Connaught Laboratories, Inc.; Pasteur Merieux Connaught, Inc.; Baxter International, Inc., individually and as Successor in Interest to North American Vaccine, Inc.; Merck & Co., Inc.; SmithKline Beecham Corporation d/b/a GlaxoSmithKline; BioPort Corporation, Inc.; and Eli Lilly and Company.

Respondents in this Court and Appellants in the underlying *Collins* matter: Bryan D. Collins, as parent and next friend of Zachary W. Collins; Allyson M. Collins, as parent and next friend of Zachary W. Collins; Freddie M. Anderson, as parent and next friend of Robert Thomas-Anderson; Georgia M. Anderson, as parent and next friend of Robert Thomas-Anderson; Herman R. Bernard, as parent and next friend of Reginald L. Bernard; et al.

The following additional Defendants in *Collins* have not joined in the Petition and are being served as Respondents:

American International Chemical, Inc.; B. F. Ascher & Company, Inc.; Bayer Corp.; Bristol-Meyers Squibb Co.; Evans Medical Ltd.; RPK Pharmaceuticals; Dolder; Lisa Stone, M.D., individually and as Successor in Interest to Children's Medical Group, PA; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Byron's Discount Drugs; Jeff Court, M.D., individually and as Successor in Interest to Children's Medical Group, PA; Walter E. Dawkins, M.D.; Louisa Lawson, M.D.; Sartin's Discount Drugs, Inc.; Brian Stretch, M.D.; Julian Lee Owen; Village Pharmacy; John Does; and Children's Medical Group, P.A.

Petitioners in this Court and Defendants/Appellees in the underlying *Stewart* matter: Wyeth Laboratories; Wyeth-Ayerst; Wyeth-Ayerst Laboratories; Wyeth Lederle; Wyeth Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; Aventis Pasteur, Inc., individually and as successor in interest to Connaught Laboratories, Inc.; Pasteur Merieux & Pasteur Merieux Connaught; Baxter International, Inc., individually and as successor in interest to North American Vaccine, Inc.; Merck & Co., Inc.; SmithKline Beecham Corporation d/b/a GlaxoSmithKline; BioPort Corporation, Inc.; and Eli Lilly and Company.

Respondents in this Court and Plaintiffs/Appellants in the underlying *Stewart* matter: John Stewart, III; Annette C. Stewart; Bryan D. Collins; Allyson M. Collins; Herman R. Bernard, Jr.; Carola H. Bernard; Larry Blackwell; Larry Blackwell; Melissa McGrew; Jules J. Cousin, Jr.; Beverly Cousin; John Gamberi; Mark Klinedinst; Laurie Klinedinst; Teri Pitts; Traci Pitts; Kevin Samuel; Victoria Samuel; David G. Underwood; Lauren Underwood; Jeremy Williams; Shawanda Williams.

The following additional Defendants in *Stewart* have not joined in the Petition and are being served as Respondents:

American International Chemical, Inc.; B. F. Ascher & Company, Inc.; Evans Medical, Inc.; Dolder; Bert Bradford, M.D., Gulf Coast Pediatric Clinic; Walter E. Dawkins, M.D.; Owen Lee, M.D., Sartin's Discount Drugs, Inc., Brian Stretch, M.D. d/b/a Street Clinic; Village Pharmacy; John Does 1-200, who are individuals, proprietorships, corporations, or other entities whose names and identities are otherwise unknown to the plaintiffs; Jeffrey Crout, M.D.; Children's Medical Group, PA; RPK Pharmaceuticals.

CORPORATE DISCLOSURE STATEMENT

SmithKline Beecham Corporation

The ultimate parent of SmithKline Beecham Corporation d/b/a GlaxoSmithKline is GlaxoSmithKline plc., which, through its wholly owned subsidiaries, owns 100% of SmithKline Beecham Corporation d/b/a GlaxoSmithKline. To the knowledge of GlaxoSmithKline plc, none of the shareholders of GlaxoSmithKline plc owns 10% or more of its outstanding shares.

Aventis Pasteur Inc.

The parent corporation of Aventis Pasteur Inc. is Life Sciences Holdings Ltd. No publicly held corporation owns 10% or more of the stock of Aventis Pasteur Inc.

Abbott Laboratories, Inc.

Abbott Laboratories has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock or other ownership interest.

Wyeth

Wyeth is a publicly traded corporation with no parent and no other publicly traded corporation owns 10% or more of its stock.

Baxter International, Inc.

Baxter International, Inc. does not have a parent corporation nor does any publicly held company own more than 10% of its stock.

Merck & Co., Inc.

Merck & Co., Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock or other ownership interest.

BioPort Corporation, Inc.

BioPort Corporation is privately owned and there is no publicly held corporation that owns 10% or more of its stock or other ownership interest.

Eli Lilly and Company

Eli Lilly and Company does not have a parent corporation nor does any publicly held company own more than 10% of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners SmithKline Beecham Corporation d/b/a GlaxoSmithKline, Abbott Laboratories, Inc., Aventis Pasteur, Inc., Connaught Laboratories, Pasteur Merieux, Pasteur Merieux Connaught, Baxter International, Inc., individually and as successor in interest to North American Vaccine, Inc., BioPort Corporation, Inc., Merck & Co., Inc., and Wyeth f/k/a American Home Products Corporation ("Vaccine Defendants") and Eli Lilly and Company (collectively referred to as "Petitioners") file this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's orders are unpublished and were rendered in Civil Action No. 3:01CV97NLN; *Bryan D. Collins, et al. v. American Home Products Corp., et al.*, and Civil Action No. 3:02CV472LN; *John W. Stewart, III, et al. v. American Home Products Corp. et al.*, In the United States District Court for the Southern District of Mississippi, Jackson Division. The district court rendered an order denying remand in each case, *see* App. at 14a and 18a, and subsequently dismissed both cases, *see* App. at 7a and 9a.

The *Collins* and *Stewart* cases were consolidated by the court of appeals. The opinion of the court of appeals was handed down in No. 02-60736 (consolidated with No. 02-60764), *Bryan D. Collins, et al. v. American Home Products Corp. et al.*, in the United States Court of Appeals for the Fifth Circuit. *See* App. at 1a. The court of appeals' opinion was published and is reported as *Collins v. American Home Products Corp.*, 343 F.3d 765 (5th Cir. 2003).

JURISDICTION

The judgment of the Fifth Circuit sought to be reviewed in this case was entered on September 9, 2003. The Vaccine Defendants' timely filed petitions for panel rehearing and rehearing en banc were denied on October 4, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the court of appeals' decision.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between (1) citizens of different states. . . .").

28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

42 U.S.C. § 300aa-11(a)(2)(A) ("No person may bring a civil action for damages . . . arising from a vaccine-related injury or death . . . unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death. . . .").

42 U.S.C. § 300aa-11(a)(3) ("No vaccine administrator . . . may be made a party to a civil action (other than a civil action which may be brought under paragraph (2)) for damages for a vaccine-related injury or death associated with the administration of a vaccine. . . .").

STATEMENT OF THE CASE

This case arises from claims asserted by the Plaintiffs, who were plaintiffs in two cases filed in the First Judicial District of Hinds County, Mississippi (the "*Collins*" and "*Stewart*" cases), for injuries allegedly arising out of the administration of vaccines to their minor children. The cases were consolidated on appeal by the Fifth Circuit.

Petitioners, who were defendants in the district court, are the manufacturers and distributors of certain childhood vaccines allegedly administered to the Plaintiffs' children ("Vaccine Defendants") and one of the manufacturers of thimerosal, which was used as a preservative in the vaccines ("Thimerosal Defendants"). The other defendants were the doctors, medical practices, and pharmacies who allegedly manufactured, distributed, and/or administered the vaccines ("Vaccine Administrators"). The Vaccine Administrators are the only defendants that are residents of Mississippi.

Petitioners removed each of the actions in question to the United States District Court for the Southern District of Mississippi, invoking the court's diversity jurisdiction and demonstrating that the only resident defendants had been fraudulently joined. They asserted that the district court lacked subject matter jurisdiction over the claims against the resident defendants by virtue of Plaintiffs' failure to comply with the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 *et seq.* ("Vaccine Act"). Specifically, the uncontroverted facts showed that Plaintiffs had failed to file petitions for compensation with a specially constituted court of special masters within the United States Court of Federal Claims ("Vaccine Court") and thus had not exhausted the statutory compensation remedy provided by the Vaccine Act. That failure to exhaust the Vaccine Act remedy barred

any court from exercising subject matter jurisdiction over the claims against the resident defendants and procedurally precluded all possibility of a recovery here.

> No person may bring a civil action for damages . . . in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine . . . unless a petition has been filed . . . for compensation under the Program for such injury or death and . . . the United States Court of Federal Claims has issued a judgment . . . on such petition. . . .

42 U.S.C. § 300aa-11(a)(2)(A).

Plaintiffs moved for remand in both cases. They argued in part that their claims were not subject to the Vaccine Act and its jurisdictional bar because they alleged an injury from the thimerosal preservative used in FDA-approved vaccine formulas and that the preservative so used should be classed as an "adulterant" or "contaminant." *See* 42 U.S.C. § 300aa-33(5) (defining "vaccine-related injury" as any "illness, injury, condition, or death associated with" enumerated vaccines, but not conditions "associated with an adulterant or contaminant intentionally added to such a vaccine").

The district court ultimately denied the motions to remand in both the *Collins* and *Stewart* cases, concluding that the Vaccine Act covered Plaintiffs' claims and that their failure to exhaust the Vaccine Act remedy required the court to conclude "that there no longer exists any reasonable possibility that the claims asserted by the plaintiffs against the resident defendants are presently cognizable in any forum other than the [Vaccine Court]." App. at 18a; *see also* App. at 12a.

Having found that the resident defendants were fraudulently joined, the district court dismissed the claims against them in both cases. The court also dismissed the claims against the remaining defendants for failure to exhaust the statutory compensation remedy under the Vaccine Act. *See* App. at 7a and 9a.

Plaintiffs appealed the district court's decisions in both cases, and the appeals were consolidated. In their appeal briefs in each case, Plaintiffs challenged asserted defects in the removals and some aspects of the dismissal order.

The Fifth Circuit heard oral argument on August 6, 2003. The next day, a different panel of the Fifth Circuit issued *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003), *vacated on reh'g en banc*, 355 F.3d 357 (5th Cir. 2003), holding that a district court deciding whether a nondiverse defendant has been fraudulently joined may not resolve that issue in favor of the removing defendant where the basis for the claim of fraudulent joinder is a defense "common" to the diverse and nondiverse defendants alike. *See Smallwood*, 342 F.3d at 407. The majority expressed its view that this Court's decision in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914), dictated this result.

On September 9, 2003, the *Collins* panel extended the "common defense" rule announced in *Smallwood* to this case and remanded to the district court with instructions that both *Collins* and *Stewart* be remanded to state court. *Collins v. Am. Home Prods. Corp.*, 343 F.3d 765, 769 (5th Cir. 2003).[1]

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1. The Vaccine Defendants attempted to file a post-submission brief directed to the *Smallwood* issue—which, as noted above, was raised by the Court, *sua sponte*, for the first time at oral argument. Their request for leave to file the supplemental brief was denied.

The Vaccine Defendants filed petitions for panel rehearing and rehearing en banc, demonstrating that, even if the *Smallwood* rule were correct, it could not be extended to a case like this one where the "common defense" was a purely procedural and jurisdictional bar—here, the lack of subject matter jurisdiction under the Vaccine Act. As the Vaccine Defendants pointed out, in such a case, there was no possibility that the fraudulent joinder inquiry would improperly devolve into a merits decision.

The Fifth Circuit voted to rehear *Smallwood* en banc and then granted the Vaccine Defendants' motion to stay the mandate in *Collins* pending the outcome of *Smallwood* (as well as the pending petitions for rehearing in *Collins*). On September 10, 2004, the Fifth Circuit issued its en banc opinion in *Smallwood* holding that the "common defense" rule[2] "applies only in that limited range of cases where the allegation of improper[3] joinder rests only on a showing that there is no reasonable basis for predicting that state law would allow recovery against the in-state defendant ***and that showing is equally dispositive of all defendants***." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004)

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2. The term "common defense rule" was used in the Fifth Circuit's panel opinion, *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003), *vacated on reh'g en banc*, 355 F.3d 357 (5th Cir. 2003), but not in the majority en banc opinion. The first dissenting opinion refers to the "common defense" rule. *See, e.g., Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 583 n.10 (Jolly, J., dissenting).

3. The en banc majority opinion rejected the term "fraudulent" joinder in favor of "improper" joinder. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d at 571 n.1.

(en banc) (emphasis added). The en banc opinion again relied on *Cockrell*, holding that when the defense providing the basis for fraudulent joinder is common to both resident and non-resident defendants, "there is no improper joinder; there is only a lawsuit lacking in merit." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004) (en banc) (citing *Cockrell*, 232 U.S. 146). The petitions for panel rehearing and rehearing en banc in this matter were then denied. *See* App. at 22a.

The Vaccine Defendants filed another motion to stay the mandate on October 6, 2004. They also filed a letter under FED. R. CIV. P. 28(j) in order to apprise the Fifth Circuit of a contemporaneous decision in *Moss v. Merck & Co.*, holding that Vaccine Act defenses are not applicable to claims against manufacturers of thimerosal. *See Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004). The Vaccine Defendants argued that, by virtue of *Moss*, the purportedly "common defense" of the Vaccine Act was not dispositive of the claims against all defendants, as required by *Smallwood*.[4] The Fifth Circuit denied the Vaccine Defendants' motion to stay the mandate on November 12, 2004. The mandate issued on the same date.

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4. Petitioner Eli Lilly and Company does not join in any argument in this Petition based on *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004).

REASONS FOR GRANTING THE PETITION

The most basic principle of *stare decisis* indicates that this Court should review the decision of the Fifth Circuit here. In rejecting jurisdiction over this case based on a supposed "common defense" rule, the Fifth Circuit has created a direct conflict with other circuits, overturned years of its own precedent, and wholly without justification significantly constrained a defendant's statutory right to removal. Neither the Fifth Circuit's opinion in this case nor its opinion in the *Smallwood* case, providing the decisional rule applied here, offers any basis for implementing such a sea change in federal jurisdictional law.

I. The Origins of the Doctrine of Fraudulent Joinder

The doctrine of fraudulent joinder is firmly rooted in longstanding principles of federal jurisdiction. In the diversity context, the removal statutes are designed by Congress to provide nonresident defendants with a federal forum to litigate state claims in order to protect them from any perceived prejudice or preference of the state court regarding the resident plaintiffs. *See Pease v. Peck*, 59 U.S. 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."). It is in accordance with this principle that a defendant who is fraudulently joined to preclude federal jurisdiction cannot prevent removal, and that such a resident defendant's citizenship should be disregarded for purposes of determining diversity.[5] Thus, the focus of the

5. *See, e.g., Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 877 (1st Cir. 1983) (party fraudulently joined to defeat removal is (cont'd)

fraudulent joinder inquiry is whether a nondiverse party has been added solely to deprive the federal courts of jurisdiction. *See, e.g.*, *Smallwood*, 385 F.3d at 582 (Jolly, J., dissenting) (citing 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c][iv][A] (3d ed. 2004).

To effectuate Congress' intent in providing diversity jurisdiction, the federal courts must protect a defendant's

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(cont'd)
disregarded in determining diversity of citizenship); *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460-61 (2d Cir. 1998) (plaintiff may not defeat defendant's right to removal by fraudulently joining defendants); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990) (distinguishing case from one where joinder of nondiverse defendants could be disregarded because of no reasonable basis for liability); *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999) (nondiverse defendants who are fraudulently joined do not preclude removal); *Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 323 (5th Cir. 2001) (removal not precluded by fraudulent joinder of nondiverse party); *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907-09 (6th Cir. 1999) (citizenship of fraudulently joined defendant properly disregarded); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (citizenship of fraudulently joined defendant is disregarded for purposes of determining diversity); *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806, 810-11 (8th Cir. 2003) (nondiverse defendant fraudulently joined in state court action will not defeat removal jurisdiction if there is no reasonable possibility of recovery against that defendant); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (nondiverse defendant properly deemed fraudulently joined and disregarded when plaintiff's complaint failed to state claim for negligent representation against that defendant as matter of state law); *Am. Nat'l Bank & Trust Co. of Sapulpa v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991) (fraudulently joined defendants do not preclude removal); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287-88 (11th Cir. 1998) (fraudulently joined parties disregarded); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c][iv][A] (3d ed. 2004).

statutory right to remove and prevent other parties from subverting this right. This Court has long held the view that in such cases, where it is suggested that a fraud upon the jurisdiction of the federal courts has been committed, "'the Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.'" *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907) (quoting *Ala. Great Southern Ry. Co. v. Thompson*, 200 U.S. 206 (1906)). Further, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal courts as to permit the state courts, in proper cases, to retain their own jurisdiction." *Id.* at 186.

Analysis of a fraudulent joinder situation focuses on the resident defendant and whether there is a reasonable possibility of recovery against that party. This Court's jurisprudence does not state that a "common defense" among all defendants precludes finding a fraudulent joinder. With its ruling in *Smallwood* and the extension of the *Smallwood* rule in this case, the Fifth Circuit has placed unprecedented and unprincipled limits on the doctrine of fraudulent joinder based on the mere happenstance that a defense is shared by multiple defendants. This new rule conflicts with the purpose and history of fraudulent joinder and unfairly thwarts congressionally mandated access to federal courts for truly diverse defendants.

II. The *Smallwood* Rule Announced by the Fifth Circuit and Applied in This Case Creates an Unprecedented and Inappropriate Limitation Upon Fraudulent Joinder

A. The *Smallwood* Rule Establishes a New "Common Defense" Inquiry

Relying in part on this Court's decision in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914), for support, the Fifth Circuit recently held:

> [W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant. In such a situation, the entire suit must be remanded to state court.

Smallwood v. Ill. Cent. R.R. Co., 385 F.3d at 571.

Key to its reasoning was the majority's view that, under *Cockrell*, a defense common to both diverse and nondiverse defendants precludes removal based upon fraudulent joinder. In such a situation, "there is no improper joinder; there is only a lawsuit lacking in ***merit***." *Id.* at 574 (emphasis added). The court went on to say:

> In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such—an allegation that, as phrased by the Supreme Court in *Chesapeake & O.R. Co. v. Cockrell*, "the plaintiff's case [is] ill founded as to all the defendants."

Smallwood, 385 F.3d at 574 (citation omitted).

Petitioners do not dispute that a merits-based inquiry is inappropriate at the removal stage. But the majority provided no explanation as to why the presence of a common defense makes a fraudulent joinder inquiry equivalent to an examination of the merits. A fraudulent joinder based on lack of subject matter jurisdiction, for example, would not touch upon the merits of any claim. Yet the Fifth Circuit compounded its misconstruction of federal jurisdictional law in this area by applying the common defense theory here, with facts providing even ***less*** justification for doing so than *Smallwood*, thereby demonstrating the cascading implications of its new and incorrect formulation of jurisdictional law, which will result in huge inefficiencies and the unfair denial of a federal forum to innumerable future defendants.

B. The Traditional Test for Fraudulent Joinder Is Not a Common Defense Inquiry

Contrary to the majority's assertion in *Smallwood*, the traditional test for fraudulent joinder focuses solely on the viability of the claims against the resident defendants. It involves "a simple question and, eschewing personal motives of the plaintiff, applies an objective test to produce a fair answer. . . ." *Smallwood*, 385 F.3d at 577 (Jolly, J., dissenting). Thus, "[w]hen a diverse defendant removes to federal court on grounds of 'fraudulent joinder' the federal court asks only:

> [W]hether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Id. (quoting majority opinion at 573).

Despite its claim of adherence to the traditional test, the majority in *Smallwood* impermissibly erected a new hurdle to be cleared by the removing defendant:

> [W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant.

Smallwood, 385 F.3d at 571. This new test changes the fraudulent joinder inquiry from one focused on the resident defendant, and whether viable claims have been asserted against that party sufficient to defeat federal jurisdiction, to an assessment of all defendants in relation to the plaintiff's claims. Under *Smallwood*, in any case where a defense establishing fraudulent joinder of the resident defendants is "shared" by the nonresident defendants, the nonresidents cannot invoke their statutory right to removal and have all claims and defenses adjudicated in federal court. A removing defendant may surmount the very high bar of showing the fraudulent joinder of the in-state defendant—and thus complete diversity of the remaining parties—only to have that finding nullified based on the happenstance that the diverse defendant shares a similar defense.

The rule as announced in *Smallwood* is intended to apply even though the plaintiffs have ***no*** ability to recover in state court against the in-state defendants. The *Smallwood* opinion utterly fails to explain how the common defense rule satisfies the purpose of the fraudulent joinder inquiry—*i.e.*, whether a resident defendant has been joined solely to defeat diversity. Considering the lack of ancestry or principled basis for this illogical outcome, the *Smallwood* rule should be reviewed by this Court to determine whether it presents an unsuitable and unnecessary obstacle to a defendant's rights under the removal statute.

C. *Cockrell* Does Not Require, or Even Support, the Common Defense Theory of the Fifth Circuit

More troubling in some ways than the new rule announced in *Smallwood* was the majority's insistence that it was not in fact creating a new fraudulent joinder test at all, but merely restating longstanding existing law which it bolstered by its reference to this Court's decision in *Cockrell*. *See Smallwood*, 385 F.3d at 574. But a careful reading of this Court's decision reveals that the Fifth Circuit has engaged in an unwarranted extension of *Cockrell* in crafting a common defense rule and especially in applying it to cases like this one.

In *Cockrell*, the railroad defendant removed a case to federal court on improper joinder grounds. The basis for its claim of improper joinder was that the plaintiff's entire negligence case (against both the nondiverse engineer and fireman and the diverse railroad) was "false and untrue." As "no negligent act or omission personal to the railway company was charged," the claim of improper joinder of the in-state employees "manifestly ***went to the merits of the action as an entirety*** and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Id.* at 153 (emphasis added).

Rather than announcing an additional hurdle for the removing defendant to overcome, this language from *Cockrell* is a traditional application of the fraudulent joinder test. Evaluation of the chances of success of the railroad's stated defense (a lack of negligence) unquestionably would have required an impermissible trial on the merits in the context of a removal proceeding, thus requiring a remand under the traditional test. Because of the merits-based nature

of the defense, the claim against the in-state defendants in *Cockrell* had a possibility of prevailing under state law. To derive a "common defense" rule from this language in *Cockrell* requires a reading completely out of context. The presence of a "common defense" played no part in this Court's holding that the removal analysis had impermissibly crossed the line into a merits inquiry in *Cockrell*. *See Smallwood*, 285 F.3d at 279-80 (Jolly, J., dissenting).

Further, the nature of the defense at issue in *Cockrell* demonstrates the disconnect from this Court's holding to a common defense rule. *Cockrell* involved vicarious liability —the source of the railroad's liability was the allegedly negligent conduct of its employees. *Cockrell*, 232 U.S. at 153. Thus, a finding that the employees had been fraudulently joined based on an absence of negligence on their part would have absolved the railroad company of any liability. As a result, the railroad company and the employees did not share a "common" defense, but instead, precisely the same grounds for liability. *See Smallwood*, 385 F.3d at 580 (Jolly, J., dissenting).

> In short, the entire suit was solely *founded* (or 'ill-founded') on the conduct of the in-state defendants; . . . Indeed, but for their conduct the railroad would not have been in the suit; the in-state defendants could not possibly have been fraudulently joined because their conduct was the *only* actionable conduct in the case. . . .

(emphasis in original). The vicarious nature of the railroad's liability played a critical role in the holding so heavily relied

on by the *Smallwood* majority,[6] yet the majority failed to account for this key element of the "defense" in its analysis of *Cockrell*. In these crucial regards, the *Smallwood* majority stretched the *Cockrell* holding far beyond its particular context in order to formulate a rule much broader than warranted by *Cockrell*.

D. The *Smallwood* Rule Is Unworkable

Beyond the legal ramifications spawned by the *Smallwood* rule, the Court should also consider the practical consequences that the district courts of this country will face if *Smallwood* is permitted to stand. As one of the dissents aptly pointed out, a federal district court will be required to engage in a full-blown traditional fraudulent joinder analysis focused upon the resident defendant, and then, if and only if the court concludes that the resident defendant has been fraudulently joined, will it consider whether the grounds for that improper joinder overlap with defenses that might be asserted by the other defendants. And if there is any coincidence of defense, then the case must be remanded, irrespective of the finding that the plaintiff cannot recover against the in-state defendant. *E.g.*, *Smallwood*, 385 F.3d at 579 (Jolly, J., dissenting).

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6. The language from *Cockrell* demonstrates its importance:

> As no negligent act or omission personal to the railway company was charged and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder. . . .

Cockrell, 232 U.S. at 153.

Although the *Smallwood* majority made clear that the question is one of joinder, not merits, the majority's theory will paradoxically require a federal district court to "look beyond the joinder of the nondiverse defendant to determine the defenses of the diverse defendant as well." 385 F.3d at 582 (Jolly, J., dissenting); *see also id.* at 588 (Smith, J., dissenting) (quoting same). Thus, the majority adds analytical layers to what was formerly a relatively straightforward fraudulent joinder inquiry and more detrimentally, leaves district courts effectively without guidance in navigating the obscure lines between *Smallwood*-sanctioned joinder review and impermissible merits inquiry. The Court is requested to examine both the stated bases for the rule, as well as the far-reaching implications it will have on the federal courts.

E. This Case Involves a Non-Merits Defense

Cockrell does not in any way support the remand of a case involving a purely procedural, non-merits defense, as is at issue here. *Smallwood* does not purport to apply to non-merits defenses even where they are shared by the defendants; the opinion repeatedly stressed that the improper joinder inquiry should focus on the joinder, not the merits. The issue in this case also concerns jurisdiction and joinder—not the merits of the Plaintiffs' claims.

The exhaustion requirement of the Vaccine Act, 42 U.S.C. § 300aa-11(a)(2), is not a defense even remotely touching on the merits of the Plaintiffs' claims. This tort-suit ban does not abolish Plaintiffs' civil action for claims arising from alleged vaccine related injuries, but rather suspends jurisdiction over them until the Vaccine Act's statutory prerequisites have been exhausted. 42 U.S.C. § 300aa-11(a)(2)(A). By statute, if a claim for vaccine-related injury is prematurely filed in any state or federal court, that

court "shall dismiss" it. *Id.* § 300aa-11(a)(2)(B). If there were any doubt about Congress' intent, the Act expressly precludes a vaccine manufacturer or administrator from being joined to any tort suit prior to exhaustion of the compensation remedy in Vaccine Court. *Id.* at § 300aa-11(a)(3).[7]

The Vaccine Act's tort-suit ban is purely a matter of joinder and jurisdiction—not a defense going to the merits of the Plaintiffs' claim. By recognizing that failure to exhaust the Vaccine Act remedy precluded all possibility of recovery against the resident defendants, the district court simply enforced a federally mandated limitation on its subject matter jurisdiction. Because the court below was applying the Vaccine Act according to its express and unequivocal terms to reach this jurisdictional conclusion, there is no danger that the district court impermissibly converted its fraudulent joinder/removal analysis into a decision on the merits of the Plaintiffs' entire action.

In this important regard, the important "principles of comity and federalism" on which the *Smallwood* majority rested its foundation are not transgressed when the impediment to bringing claims against the resident defendant is purely procedural. The very purpose of narrowly construing removal jurisdiction is to prevent an affront to "the dignity of the state courts":

> Most essentially, federal and state courts are ***complementary systems for administering justice***

7. In this provision, Congress intended to "prohibit[] the act—by impleader, cross-claim, or separate suit ***or any other practice***—of making a vaccine manufacturer a party to any civil action brought by a person [allegedly injured by a vaccine after the effective date of the legislation] . . . before that person has completed a compensation proceeding." H.R. Rep. No. 99-908, at 14, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6355 (emphasis added).

> ***in our Nation***. Cooperation and comity, not competition and conflict, are essential to the federal design. A State's dignitary interest bears consideration when a district court exercises discretion in a case of this order [by deciding issues other than subject matter jurisdiction first]. . . . "'Our Federalism' does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. ***What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments***."

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971) (emphasis added) (internal citations and quotations omitted)). Here, the state courts have no legitimate interests in hearing civil actions arising from claims not exhausted in Vaccine Court. By law, they lack jurisdiction to do anything but dismiss them. 42 U.S.C. § 300aa-11(a)(2)(B). The federal court has precisely the same jurisdictional problem—and the same attendant duty to dismiss—as a state court would have. *See Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778-79 (2000) ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" (quoting *Ex parte McCardle*, 74 U.S. 506 (1868)).

Under such circumstances, the common defense rule induces an illogical, improper, and judicially wasteful result—*i.e.*, remand to a court that is equally lacking in

jurisdiction, one that itself lacks the power to do anything but dismiss the action. *See, e.g., Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) ("Were the state action remanded, the Louisiana courts would be bound by our ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction. A remand thus would be a futile gesture, wasteful of scarce judicial resources, an exercise in which we decline to engage."); *Bell v. City of Kellogg*, 922 F.2d 1418, 1424-25 (9th Cir. 1991) ("Where . . . remand to state court would be futile, . . . the desire to have state courts resolve state law issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources."). The common defense rule by the court of appeals replaces the formerly precise, tailored inquiry with a blunt instrument, ill-suited in all circumstances to properly determine whether a resident defendant has been fraudulently joined.[8]

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8. Even if the *Smallwood* "common defense" rule were correct, the Fifth Circuit's own decisions show that it should never have been applied in this case for an additional reason. In *Smallwood*, the en banc Court emphasized that the improper joinder cannot be predicated upon a defense that applies to all defendants. *See, e.g., Smallwood*, 385 F.3d at 571 ("[W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant."). The converse of this proposition is that the "common defense" rule does not preclude a finding of improper joinder when the defense is inapplicable to some of the defendants, as is the case here. In *Moss v. Merck & Co.*, the Fifth Circuit held that manufacturers of the vaccine preservative thimerosal are not "vaccine manufacturer[s]" entitled to the protections of the Vaccine Act. *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004). Petitioner Eli Lilly and Company does not join in any argument in this Petition based on *Moss*.

(cont'd)

III. An Inter-Circuit Split Exists That Requires Resolution by This Court

The "common defense rule" applied by the Fifth Circuit in *Smallwood* and this case first originated in the Third Circuit in *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990).[9] In *Boyer*, the Third Circuit invoked *Cockrell*, and held that "where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination

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(cont'd)

The *Moss* decision concluded that the Vaccine Act only applies to vaccine-related lawsuits brought against a "vaccine administrator or manufacturer." *Id.* at 503. The Fifth Circuit thus held that the Vaccine Act is not applicable to claims against the Thimerosal Defendants. The *Moss* and *Smallwood* decisions, read together, mean that the common defense rule cannot apply in the present cases because the Vaccine Act defenses available to the Vaccine Defendants and the Vaccine Administrators are not common defenses that are equally dispositive of the claims against the Thimerosal Defendants. The rule, therefore, should have not been applied in this case. Neither the *Moss* decision nor the en banc Court's significant narrowing of the "common defense" rule in *Smallwood* was available to or considered by the panel that decided this case. Those decisions were issued many months after the September 2003 panel decision at issue here. Thus, even if the *Smallwood* "common defense" rule is not rejected by this Court, its application in this case was improper, and certiorari should be granted to establish the proper contours of this new restriction on federal court jurisdiction.

9. "Since *Cockrell* was decided in 1914, the only circuit court decision that, previous to today, has interpreted it as proclaiming a 'common-defense' exception to the fraudulent joinder rule is the Third Circuit's opinion in *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990)." *Smallwood*, 385 F.3d at 580 (Jolly, J., dissenting)

which must be made by the state court." *Boyer*, 913 F.2d at 113 (emphasis added).

Eight years later, the Ninth Circuit decided *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998).[10] There, the Ninth Circuit held that a district court can apply a procedural bar to find a defendant fraudulently joined—even though the same procedural bar is equally applicable to the claims against other defendants. In *Ritchey*, as here, the diverse defendant argued that the nondiverse defendants were fraudulently joined because the plaintiff's claims against ***all defendants*** were barred by the statute of limitations. Despite the applicability of that procedural defense to all defendants, the Ninth Circuit affirmed the denial of remand, emphasizing that the limitations defense was "a kind of ***procedural bar, and not one which relates to the merits of the case.***" *Ritchey*, 139 F.3d at 1319 (emphasis added).

Cognizant of the *Cockrell* decision, the Ninth Circuit emphasized the procedural nature of the statute of limitations bar and explained the defense as follows:

> It is one that does not truly go to the merits of the plaintiff's claim in any sense. It does not assert some excuse or justification for what the defendant is alleged to have done, nor does it assert any release or waiver of any right of action against the defendant. It does not even deny the wrong or claim contributory fault or set off.

Id.; *see also LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 691-92 (7th Cir. 1998) (predicating finding of fraudulent joinder on statute of limitations defense that applied to all potential defendants).

10. The *Smallwood* majority acknowledged that *Ritchey* was not concordant with its decision. *See Smallwood*, 385 F.3d at 575 n.21.

The decision in this case has created a split of authority between the Fifth[11] and Ninth Circuits (as well as an implied split with the Seventh)[12] because in this case, the Fifth Circuit has applied the "common defense" rule to preclude a fraudulent joinder analysis in circumstances involving only a purely procedural, non-merits based, defense. In so doing, the Fifth Circuit has created a split of authority among the circuits which requires resolution by this Court.

11. Prior to its decision in *Smallwood*, the Fifth Circuit had uniformly applied a two-pronged test for determining whether a party had been fraudulently joined, requiring that the removing party establish (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the nondiverse party in state court. *See, e.g., Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003); *Ross v. CitiFinancial, Inc.*, 344 F.3d 458, 461 (5th Cir. 2003); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 311-12 (5th Cir. 2002); *Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 323 (5th Cir. 2001); *Griggs v. State Farm Lloyds*, 181 F.3d 694, 698-99 (5th Cir. 1999); *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997); *Burden v. Gen. Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979); *Parks v. N.Y. Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962). At least three of these opinions, by their facts, implicitly but specifically rejected the common defense theory by affirming a finding of fraudulent joinder where a "common defense" was present. *See Ross*, 344 F.3d at 463, 467 (fraudulent joinder affirmed in presence of common defense of statute of limitations); *Great Plains*, 313 F.3d at 318 (district court properly granted judgment on the pleadings dismissing plaintiffs' claim against all defendants for negligent misrepresentation); *Rodriguez*, 120 F.3d at 591-92 (affirming fraudulent joinder finding based on lack of duty owed by nondiverse defendant; diverse defendant identically situated for purposes of negligence claim).

12. The *LeBlang* case did not specifically discuss the common defense issue, but its holding that the same defense could provide the basis for a finding of fraudulent joinder is clearly in conflict with the *Smallwood* rule.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 9, 2003

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-60736, Consolidated With No. 02-60764

02-60736

Bryan D. Collins, as parent and next friend of Zachary W. Collins; Allyson M. Collins, as parent and next friend of Zachary W. Collins; Freddie M. Anderson, as parent and next friend of Robert Thomas-Anderson; Georgia M. Anderson, as parent and next friend of Robert Thomas-Anderson; Herman R. Bernard, as parent and next friend of Reginald L. Bernard; et al.,

Plaintiffs-Appellants,

v.

American Home Products Corporation, doing business as Wyeth Laboratories Inc.; Wyeth Lederle; Wyether Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; American International Chemical Inc.; Aventis Pasteur Inc., Individually and as Successor in Interest to Connaught Laboratories Inc.; Pasteur Merieux Connaught Inc.; B.F. Ascher & Company Inc.; Baxter International Inc., Individually and as Successor in Interest to North American Vaccine Inc.; Bayer Corporation; Bioport Corporation Inc.; Bristol-Myers Squibb and Company; Evans Medical Ltd.; Merck and Company Inc.; RPK Pharmaceuticals; Dolder;

Appendix A

Eli Lilly & Company; Smithkline Beecham Corporation; Lisa Stone, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Byron's Discount Drugs; Jeff Court, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Walter E. Dawkins, M.D.; Louisa Lawson, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, M.D.; Julian Lee Owen, M.D.; Village Pharmacy; John Does; Children's Medical Group P.A.,

Defendants-Appellees.

02-60764

John W. Stewart, III; Annette C. Stewart; Bryan D. Collins; Allyson M. Collins; Herman R. Bernard, Jr.; Carola H. Bernard; Larry D. Blackwell; Melissa L. McGrew; Jules J. Cousin, Jr.; Beverly L. Cousin; John A. Gamberi; Connie J. Gamberi; Mar' A. Klinedinst; Laurie E. Klinedinst; Terri M. Pitts; Tracy L. Pitts; Kevin T. Samuel; Victoria Samuel; David G. Underwood; Lauren Underwood; Jeremy Williams; Shawanda R. Williams,

Plaintiff-Appellants,

v.

American Home Products Corporation, doing business as Wyeth; Wyeth Laboratories; Wyeth-Ayerst; Wyeth-Ayerst Laboratories; Wyeth Lederle; Wyther Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories Inc.; American International Chemical Inc.;

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Aventis Pasteur Inc., individually and as successor in interest to Connaught Laboratories Inc.; Pasteur Merieux & Pasteur Merieux Connaught; B.F. Ascher & Company Inc.; Baxter International Inc., individually and as successor in interest to North American Vaccine Inc.; Bioport Corporation Inc.; Evans Medical Limited; Dolder; Eli Lilly & Company; Merck and Company Inc.; Smithkline Beecham Corporation; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Walter E. Dawkins, M.D.; Owen J. Lee, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, M.D., doing business as The Street Clinic; Village Pharmacy LLC; Wyeth; John Does, 1-200, who are individuals, proprietorships, corporations, or other entities whose names and identities are otherwise unknown to the plaintiffs; Jeffrey Crout, M.D.; Children's Medical Group P.A.; RPK Pharmaceuticals Inc.,

Defendants-Appellees.

JUDGES: Before EMILIO M. GARZA and DENNIS, Circuit Judges, and DUPLANTIER*, District Judge.

OPINION BY: EMILIO M. GARZA

EMILIO M. GARZA, Circuit Judge:

The plaintiffs in two products liability actions, all of whom are Mississippi residents, appeal the district court's denial of their motions to remand and dismissal of their state law claims against a variety of Mississippi resident and non-

* Senior District Judge of the Eastern District of Louisiana, sitting by designation

resident defendants. Among the defendants are manufacturers of certain childhood vaccines containing the preservative thimerosal, pharmacies who dispensed those vaccines, and physicians who prescribed them.

In *Collins v. American Home Products Corporation,* the plaintiffs brought claims on behalf of their minor children seeking to recover for injuries allegedly suffered by the children as a result of vaccinations containing thimerosal. In *Stewart v. American Home Products Corporation,* many of the same plaintiffs brought claims on their own behalf to recover for expenses and other injuries they allegedly incurred as the parents of injured children. The district court concluded that the Mississippi defendants had been fraudulently joined and that the claims against the remaining defendants must be dismissed because the plaintiffs had failed to comply with the National Childhood Vaccine Injury Act of 1986, *42 U.S.C. § 300aa-1 et seq.*

"[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583, 143 L.Ed.2d 760, 119 S.Ct. 1563 (1999).* In a recent opinion, this Court applied the following holding from the Third Circuit's decision in *Boyer v. Snap-On Tools Corporation, 913 F.2d 108 (3d Cir.1990)*:

> [W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.

Appendix A

*Smallwood v. Ill. Cent. R.R. Co., 342 F.3d 400, 2003 U.S. App. LEXIS 16181, No. 02-60782, __ F.3d __ , 2003 WL 21805636, at *3 (5th Cir. Aug. 7, 2003)* (quoting *Boyer, 913 F.2d at 113*) (alteration in original).

Here, the defendants successfully convinced the district court to rule on a common defense under the pretense of determining whether the Mississippi defendants had been fraudulently joined. As we stated in *Smallwood,* "[t]his use of fraudulent joinder frustrates the overarching principle of the well-pleaded complaint rule, that state courts are equally competent to decide federal defenses." *2003 U.S. App. LEXIS 16181, [WL] at *5*; *see also 2003 U.S. App. LEXIS 16181, [WL] at *4 n.35* (citing *Cheskiewicz ex rel. Cheskiewicz v. Aventis Pasteur, Inc., 2002 U.S. Dist. LEXIS 15339, No. 02-3583, 2002 WL 1880524, at *3 (E.D. Pa. Aug. 15, 2002)* (unpublished)).[1]

Accordingly, we VACATE the dismissal of the plaintiffs' claims and REMAND with instructions that both cases be remanded to the state court from which they were removed.

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1. On appeal, the defendants argue that the district court's fraudulent joinder determination in *Stewart* was correct for the additional reason that the plaintiffs' claims fail under Mississippi law. Although it appears that Mississippi's learned intermediary doctrine bars the plaintiffs' claims against the non-diverse pharmacy defendants, *Moore ex rel. Moore v. Mem'l Hosp. of Gulfport, 825 So.2d 658, 664-66 (Miss. 2002)*, this defense does not preclude the possibility of relief against the other non-diverse defendants. Because the remaining defenses apply equally to the claims asserted against the diverse and non-diverse defendants, those defenses cannot, under *Smallwood,* serve as the basis for a finding of fraudulent joinder. Accordingly, we lack subject matter jurisdiction to address the merits of the plaintiffs' claims.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 2, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:01CV979LN

BRYAN D. COLLINS AND ALLYSON M. COLLINS, PARENTS AND NEXT FRIEND OF ZACHARY W. COLLINS, ET AL.

PLAINTIFFS

vs.

AMERICAN HOME PRODUCTS CORPORATION D/B/A WYETH, ET AL.

DEFENDANTS

ORDER

This cause is before the court on the motions of several defendants to dismiss. The court has considered the motions and concludes that they are well taken and should be granted. By their complaint in this cause, each plaintiff herein seeks recovery for more than $1,000 in damages on amount of "vaccine-related injuries" and yet none has first filed a petition for compensation with the Court of Federal Claims, as required by the National Childhood Vaccine Injury Act.

Accordingly, in keeping with the explicit directive of the Vaccine Act, 42 U.S.C. §§ 300aa-1, this cause must be dismissed. *See* 42 U.S.C. § 300aa-11(a)(2)(A) (providing that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vacine-related injury or death . . . unless a petition has been filed" first in the Court of Federal Claims); 42 U.S.C. § 300aa-11(a)(2)(B) (stating that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action"). *See also Shalala v. Whitecotton*, 514 U.S. 268, 270, 115 S. Ct. 1477, 1478, 131 L. Ed. 2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

Based on the foregoing, it is ordered that the motions of the defendants to dismiss are granted, and it is therefore ordered that this cause is dismissed without prejudice.

SO ORDERED this 2nd day of August, 2002.

s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 2, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:02CV427LN

JOHN W. STEWART III AND
ANNETTE C. STEWART, ET AL.

PLAINTIFFS

VS.

AMERICAN HOME PRODUCTS CORPORATION
D/B/A WYETH, WYETH LABORATORIES, ET AL.

DEFENDANTS

ORDER

This cause is before the court on the motions of several defendants to dismiss. The court has considered the motions and concludes that they are well taken and should be granted. By their complaint in this cause, each plaintiff herein seeks recovery for more than $1,000 in damages on amount of "vaccine-related injuries" and yet none has first filed a petition for compensation with the Court of Federal Claims, as required by the National Childhood Vaccine Injury Act. Accordingly, in keeping with the explicit directive of the

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Vaccine Act, 42 U.S.C. §§ 300aa-1, this cause must be dismissed. *See* 42 U.S.C. § 300aa-11(a)(2)(A) (providing that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vacine-related injury or death . . . unless a petition has been filed" first in the Court of Federal Claims); 42 U.S.C. § 300aa-11(a)(2)(B) (stating that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action"). *See also Shalala v. Whitecotton*, 514 U.S. 268, 270, 115 S. Ct. 1477, 1478, 131 L. Ed. 2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

Based on the foregoing, it is ordered that the motions of the defendants to dismiss are granted, and it is therefore ordered that this cause is dismissed without prejudice.

SO ORDERED this 2nd day of August, 2002.

s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 1, 2002

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI, JACKSON DIVISION

No. Civ.A. 3:02CV427LN

John W. STEWART III and Annette C. Stewart, et al.

Plaintiffs

v.

AMERICAN HOME PRODUCTS CORPORATION d/b/a Wyeth, Wyeth Laboratories, et al.

Defendants

Aug. 1, 2002

MEMORANDUM OPINION AND ORDER

LEE, J.

This cause is before the court on plaintiffs' motion to remand. Defendants have responded in opposition, and the court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes that plaintiffs' motion to remand is due to be denied.

Appendix D

The plaintiffs in this case are the parents of children who are alleged to have suffered injuries as a result of their having received one or more childhood vaccines containing a preservative known as thimerosal. In a companion case, *Collins, et al. v. American Home Products Corp., et al.,* Civil Action No. 3:01CV979LN, these same plaintiffs sued in their capacity as parents and next friends of their respective children, seeking to recover damages for their children's injuries alleged to have been caused by the thimerosal-containing vaccines,. In this case, these same plaintiffs seek to recover medical expenses incurred by them and reasonably expected to be incurred by them in the future on account of their children's injuries, as well as damages for their own emotional distress alleged to have proximately resulted from their children's injuries.

The *Collins* case, like the present case, was originally filed in the Circuit Court of Hinds County, and was removed to this court by the nonresident defendants. In *Collins,* this court, after initially concluding in a memorandum opinion and order dated June 21, 2001, that it lacked either federal question jurisdiction or jurisdiction based on diversity of citizenship, concluded upon reconsideration that there was diversity jurisdiction, as there was no reasonable possibility that the plaintiffs could establish a basis for recovery against the resident defendants. The court then dismissed the case since all the plaintiffs' claims were barred by the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1.[1]

1. The Vaccine Act provides that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vaccine-related injury or (cont'd)

The question is whether that same result should occur here; and in the court's opinion it should, for just as these plaintiffs had no cognizable claims against the resident defendants in *Collins,* they have no cognizable claims of their own against the resident defendants.

As respects the ultimate source of their alleged right of recovery, plaintiffs' claims in this case are the same as their claims as parents and next friends in *Collins,* namely, that their children have been harmed from exposure to mercury contained in thimerosal, which was used as a preservative in vaccines administered to their children.[2] All that distinguishes this case from *Collins* is the fact that the plaintiffs herein purport to seek recovery in their own right, and not on behalf of their children, of medical expenses incurred for their children, and that they seek to recover damages for their own emotional distress. So far as the propriety of removal goes,

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(cont'd)

death . . . unless a petition has been filed" first in the Court of Federal Claims, and mandates that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action." 42 U.S.C. § 300aa-11(a); *see also Shalala v. Whitecotton,* 514 U.S. 268, 270, 115 S.Ct. 1477, 1478, 131 L.Ed.2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

2. As in *Collins,* the plaintiffs in this case have alluded to over-the-counter products; but it is plain that they have traced their children's injuries to having been injected with thimerosal-containing vaccines.

however, these distinctions are immaterial, for plaintiffs have no cognizable claim for these alleged damages.

First, plaintiffs' claim for medical expenses is barred by the Vaccine Act to the same extent as their claim in *Collins* to recover such expenses in their capacity as representatives of their respective children. Under the Vaccine Act, a petition for compensation may be brought by "any person who has sustained a vaccine-related injury [or] *the legal representative of such person if such person is a minor* or is disabled. . . ." 42 U.S.C. § 300aa-11(b)(1)(A) (emphasis added). The Act further provides that compensation "shall include" medical and remedial expenses incurred "by or on behalf of" the injured person. *See* 42 U.S.C. § 300aa-15(a). Thus, plaintiffs cannot avoid applicability of the Vaccine Act, and the Act's tort suit ban, merely by suing in their own name for costs that are compensable under the Act. *See Shafer v. American Cyanamid Co.*, 20 F.3d 1, 5 (1st Cir.1994) (stating that "if [the plaintiff] cannot file a petition with the Vaccine Court, the Act says a tort suit does not apply to him," but if he can file such a petition, then the tort suit ban does apply).[3]

Moreover, as defendants correctly argue, Mississippi law does not recognize a claim for emotional distress damages

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3. The court agrees with defendants that plaintiffs would be precluded from suing for these costs in any event since they have already sued in *Collins* for these same damages on behalf of their respective children. *See Lane v. Webb*, 220 So.2d 281, 285 (Miss. 1969) (holding that "where the father . . . brings a suit as next friend of his minor child, he waives on the child's favor his right to recover the expenses of hospital treatment, and is thereafter estopped to claim them in a separate suit.").

on behalf of parents for injuries alleged to have resulted in the manner charged by plaintiffs herein. *Cf. Downtown Grill, Inc. v. Connell,* 721 So.2d 1113, 1122 (Miss.1989) (stating, "If this Court is unwilling to allow parents to recover damages for the severe personal injury of their child, we certainly will not allow recovery of damages by a parent for the alleged malicious prosecution of one's minor child.") (citing *Butler v. Chrestman,* 264 So.2d 812, 817 (Miss.1972), and *Fowler Butane Gas Co. v. Varner,* 244 Miss. 130, 156, 141 So.2d 226, 236 (1962)), in which the court stated that "'. . . if a minor sustains personal injuries under such circumstances of wilfulness, aggravation, or oppression as to justify an imposition of exemplary or punitive damages, upon the wrongdoer, the right of recovery thereof is in the child, and that there can be no recovery of the item by the parent in his own right.' It is also said: . . . that the measure of damages in a parent's action for injuries to a minor child, other than a case of seduction, is the actual damage which the plaintiff has suffered . . .'").

Accordingly, for the same reason this court ultimately denied plaintiffs' motion to remand in *Collins,* the court herein concludes that plaintiffs' motion to remand should be denied.

It is therefore ordered that plaintiffs' motion to remand is denied.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 1, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:01CV979LN

BRYAN D. COLLINS AND ALLYSON M. COLLINS, PARENTS AND NEXT FRIEND OF A ZACHARY W. COLLINS, ET AL.

PLAINTIFFS

VS.

AMERICAN HOME PRODUCTS CORPORATION D/B/A WYETH, ET AL.

DEFENDANTS

ORDER

This cause is before the court on the motion of defendants American Home Products Corporation, Abbott Laboratories, Inc., Aventis Pasteur, Inc., Baxter International, Inc., BioPort Corporation, Inc., Eli Lilly and Company, Merck & Company, and SmithKline Beecham Corporation for reconsideration of this court's June 21, 2002 order granting plaintiffs' motion to remand. Plaintiffs have not filed a formal response in opposition to the motion, but have advised the court by letter

that they do oppose the motion. For the reasons that follow, the court concludes that defendants' motion to reconsider should be granted and that this court's previous order remanding the case should be vacated.

Among other things, this court expressed the view in its June 21 opinion and order that "defendants unquestionably ha[d] the better of the argument on the issue of whether injuries alleged to have resulted from thimerosal in vaccines constitute vaccine-related injuries under the (National Childhood Vaccine Injury Act (Vaccine Act))" so as to be consequently barred by the Vaccine Act's ban on tort claims,[1] and that the court had no doubt that it would conclude that the plaintiffs' claims were vaccine-related if the issue were presented to the court in a context other than fraudulent joinder. The court, though, held that it could not say there was no reasonable possibility of recovery. In other words, the court expressed the view that there existed a reasonable possibility that a court might accept the plaintiffs' argument

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1. As explained at length in its earlier opinion, the Vaccine Act provides that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vaccine-related injury or death . . . unless a petition has been filed" first in the Court of Federal Claims, and mandates that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action." 42 U.S.C. § 300aa-11(a); *see also Shalala v. Whitecotton*, 514 U.S. 268, 270, 115 S. Ct. 1477, 1478, 131 L. Ed. 2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

that thimerosal was an adulterant or contaminant so that their claims for injuries from thimerosal in vaccines were not vaccine-related and hence were not barred by the Vaccine Act.

While the court is not persuaded that its conclusion in this regard was manifestly erroneous, the court is persuaded that events which have occurred since entry of the court's order foreclose any reasonable possibility that the plaintiffs have stated a currently cognizable claim against the resident defendants. To the point, on July 3, 2002, the Court of Federal Claims Office of Special Masters entered Autism General Order #1, in which it expressly assumed jurisdiction under the Vaccine Act over Vaccine Program claims alleging a causal relationship between autism, or neurodevelopment disorders similar to autism, and certain vaccinations, including the Measles-Mumps-Rubella vaccinations, and/or "by the 'thimerosal' ingredient contained in certain Diphtheria-Tetanus-Pertusis ("DTP"), Diphtheria-Tetanus-acellar Pertussis ("dTaP"), Hepatitis B, Hemophilus Influenza Type B ("HIB") vaccinations," or by some combination of the two. Since the Court of Federal Claims has jurisdiction only to grant relief under the Vaccine Act for "vaccine-related" injuries, and since the Office of Special Masters has explicitly assumed jurisdiction over claims for injuries alleged to have been caused by thimerosal in certain vaccines, it necessarily follows that the Office of Special Masters has implicitly rejected the notion that thimerosal is an adulterant or contaminant and has concluded that such claims for these injuries are "vaccine related." Thus, even assuming that this court was correct in its earlier assessment of plaintiffs' possibility of recovery against the resident defendants, given

this more recent circumstance, the court now concludes that there no longer exists any reasonable possibility that the claims asserted by the plaintiffs against the resident defendants are presently cognizable in any forum other than the Court of Federal Claims. Accordingly, the court will vacate its order remanding the case.

Based on the foregoing, it is ordered that defendants' motion to vacate the court's remand order is granted.

SO ORDERED this 1st day of August, 2002.

s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 4, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE COURT OF APPEALS

No. 02-60736

Bryan D. Collins, as parent and next friend of Zachary W. Collins; Allyson M. Collins, as parent and next friend of Zachary W. Collins; Freddie M. Anderson, as parent and next friend of Robert Thomas-Anderson; Georgia M. Anderson, as parent and next friend of Robert Thomas-Anderson; Herman R. Bernard, as parent and next friend of Reginald L. Bernard; et al.,

Plaintiffs-Appellants,

v.

American Home Products Corporation, doing business as Wyeth Laboratories Inc.; Wyeth Lederle; Wyether Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; American International Chemical Inc.; Aventis Pasteur Inc., Individually and as Successor in Interest to Connaught Laboratories Inc.; Pasteur Merieux Connaught Inc.; B.F. Ascher & Company Inc.; Baxter International Inc., Individually and as Successor in Interest to North American Vaccine Inc.; Bayer Corp; Bioport Corporation Inc.; Bristol-Myers Squibb Co; Evans Medical Ltd.; Merck and Company Inc.; RPK Pharmaceuticals; Dolder; Eli Lilly & Co; Smithkline Beecham Corp; Lisa Stone, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Bert Bradford, M.D.; Gulf Coast Pediatric

Clinic; Byron's Discount Drugs; Jeff Court, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Walter E. Dawkins, M.D.; Louisa Lawson, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, M.D.; Julian Lee Owen, M.D.; Village Pharmacy; John Does; Children's Medical Group P.A.,

Defendants-Appellees.

CONSOLIDATED WITH
NO. 02-60764

John W. Stewart, III; Annette C. Stewart; Bryan D. Collins; Allyson M. Collins; Herman R. Bernard, Jr.; Carola H. Bernard; Larry D. Blackwell; Melissa L. McGrew; Jules J. Cousin, Jr.; Beverly Cousin; John Gamberi; Connie Gamberi; Mark Klinedinst; Laurie Klinedinst; Terri M. Pitts; Tracy Pitts; Kevin T. Samuel; Victoria Samuel; David G. Underwood; Lauren Underwood; Jeremy Williams; Shawanda R. Williams,

Plaintiff-Appellants,

v.

American Home Products Corporation, doing business as Wyeth; Wyeth Laboratories; Wyeth-Ayerst; Wyeth-Ayerst Laboratories; Wyeth Lederle; Wyther Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories Inc.; American International Chemical Inc.; Aventis Pasteur Inc., individually and as successor in interest to Connaught Laboratories Inc.; Pasteur Merieux & Pasteur Merieux Connaught; B.F. Ascher & Company Inc.; Baxter International Inc., individually and as successor in interest to North American

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Vaccine Inc.; Bioport Corporation Inc.; Evans Medical Limited; Dolder; Eli Lilly & Co; Merck and Company Inc.; Smithkline Beecham Corp; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Walter E. Dawkins, M.D.; Owen Lee, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, doing business as The Street Clinic, M.D.; Village Pharmacy; Wyeth; John Does, 1-200, who are individuals, proprietorships, corporations, or other entities whose names and identities are otherwise unknown to the plaintiffs; Jeffrey Crout, M.D.; Children's Medical Group P.A.; RPK Pharmaceuticals,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 9/9/03, 5 Cir., _____, _____ F.3d _____)

Before EMILIO M. GARZA and DENNIS, Circuit Judges, and DUPLANTIER*, District Judge.

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* Senior District Judge of the Eastern District of Louisiana, sitting by designation.

* Judges King, Jones and Clement did not participate in the consideration of the en banc rehearing.

Appendix F

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

s/ Emilio M. Garza
United States Circuit Judge